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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE GILMER and JAMES JACKSON,
Petitioners,

vs.

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION, LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the peaceful presentation of a wage protest at an employer-conducted meeting of employees and by the distribution of a letter at a public meeting lose its status as protected concerted activity under Section 7 of the National Labor Relations Act[1] solely because the protest is not presented according to what the employer conceives to be the proper procedure? Stated otherwise, is an employer entitled to dictate the time, place, and manner of the exercise of protected activity?

2. Is the decision below in conflict with the decision of this Court in *NLRB* v. *Washington Aluminum,* 370 U.S. 9 (1962), and with numerous decisions of various Courts of Appeal and the National Labor Relations Board interpreting Section 7 of the National Labor Relations Act to protect employees who engage in peaceful wage protests of their own design, not in a manner dictated by the employer?

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[1] The National Labor Relations Act, as amended, 29 U.S.C. Section 141 *et seq.* All statutory references in this petition are to this statute, which will be referred to as "the Act."

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GEORGE GILMER and JAMES JACKSON,
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TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION, LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, George Gilmer and James Jackson, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in *National Labor Relations Board* v. *Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* on September 3, 1980. All parties to the proceeding are listed in the caption of the case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, by the Hon. Howard T. Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, sitting by

designation, is reported at 630 F.2d 505 and is reproduced as Appendix A hereto, *infra,* A. 1-7. The Decision and Order of the National Labor Relations Board is officially reported at 244 NLRB No. 124 (1979) and is reproduced as Appendix B hereto, *infra,* A. 8-24. Relevant portions of the transcript of the unfair labor practice hearing conducted by the Administrative Law Judge are reproduced as Appendix C hereto, *infra,* A. 25-30.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1980.[2] Jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The National Labor Relations Act:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....29 U.S.C. §157

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7. 29 U.S.C. §158 (a)(1).

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[2] Petitioners Gilmer and Jackson were not represented by private counsel in the National Labor Relations Board proceedings and did not intervene in the proceedings before the Court of Appeals. By order dated November 26, 1980, the Court of Appeals granted their motion to intervene in order to file this petition for certiorari. On November 24, 1980, Justice Stevens entered an order extending the time to file this petition.

STATEMENT OF THE CASE

Factual Background

Petitioners, George Gilmer and James Jackson, were employed by Respondent Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Teamsters Union" or "Employer") as business representatives for 14 years and 8 years, respectively, prior to April 11, 1977, on which date both were discharged by Teamsters Union Secretary-Treasurer Louis Peick (A. 11). It is admitted that the immediate cause of both discharges were two actions taken by Gilmer and Jackson to protest the low wage levels of Teamsters Union business representatives, namely, an oral statement made by Jackson at a monthly Teamsters Union meeting of Executive Board members, business representatives, and stewards and a written statement distributed to some Teamsters Union Executive Board members at a civic luncheon held for then Chicago Mayor Bilandic (A. 11, 29-30).

On the critical issue of the appropriateness of these protests, the alleged established (although unwritten) procedure for questioning wage rates for Teamsters Union employees was to present such protest to the Executive Board of the Union. Two Teamsters Union witnesses described their understanding of the practice as follows, "If you have any problems go up and see the old man [Secretary-Treasurer Peick]"—"We told Jackson to go to the front office, ... just like I do .... get a private audience with Mr. Peick." (A. 28).

The April 4, 1977, monthly meeting of the Teamsters Union, at which Jackson and Gilmer made their first protest, was attended by Executive Board members, by other business representatives employed by the Teamsters Union, and by stewards from work places where the Teamsters Union represented employee groups (who are appointed by and receive

a small stipend from the Teamsters Union)(A. 2, 12, 25). The meeting was chaired by Peick who also decided the agenda. Jackson requested and received Peick's permission to speak. When Jackson rose and complained about the salaries of the Teamsters Union staff, Peick told him that this was not the time and place for comments about staff wages. Peick then asked Gilmer if he was "in this too," to which Gilmer responded affirmatively. Later Peick told the two to report to his office the next morning (A. 2, 12-13).

On the morning of April 5, 1977, when they reported to Peick's office as instructed, Jackson repeated his comments of the previous evening about their low wage rates (A. 25-26). Peick told them to go and do some work: "If you earn it, you will get a raise" (A. 29). At the end of the conversation, Jackson asked to speak to the Teamsters Union Executive Board as soon as possible; Peick's response was "I know you would like to speak to the Board" and he laughed (A. 27-28). At no time did Peick offer them the opportunity to present their demands to the Executive Board. Peick then assigned the two men organizing functions other than what they had been doing on April 3rd (A. 13, 26).

The second protest action taken by Gilmer and Jackson was the distribution of a letter to some members of the Teamsters Union Executive Board at an April 11th community luncheon which all were attending. No discussion of any kind occurred concerning their complaints (A. 13-14). The letter again repeated Jackson's and Gilmer's wage complaints and their "desire to speak to the entire board as soon as possible" (A.23, 27). Jackson and Gilmer decided to distribute the letter at the luncheon that very morning when they learned of a misunderstanding about their previous oral comments; they felt the need to clarify their position at the earliest possible time (A. 27).

Jackson and Gilmer were fired that same afternoon because of the April 4th "disturbance," the April 11th "embarrassment," and their job performance. Peick told them that the reason was "insubordination" (A. 14).[3] Jackson and Gilmer then filed a charge with the National Labor Relations Board alleging that their discharge violated the Act (A. 15).

Proceedings Before The Board

Following a hearing, the Administrative Law Judge concluded that the "undisputed facts plainly establish that the precipitating reason for the discharges was the handing out of the April 11 letter to executive board members at the mayor's luncheon and that both this incident and the occasion of Jackson's salary complaints at the stewards meeting contributed substantially to Peick's decision to fire Jackson and Gilmer" (A. 15). The Administrative Law Judge rejected the argument that the activity was unprotected because the occasions were inappropriate for such protest, saying that "the plain thrust of the Gilmer-Jackson activity was to obtain wage relief for rank-and-file employees, and I find no reasonable basis in the circumstances for withholding the normal protections accorded such activity" (A. 16).

The Administrative Law Judge found that Gilmer and Jackson were discharged for engaging in protected, concerted activity in violation of Section 8(a)(1) of the Act and issued a recommended order requiring the Teamsters Union to reinstate them with back pay (A. 20). The Board affirmed the Administrative Law Judge's findings and conclusions and adopted his recommended order (A. 8-9).

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[3] Although the Seventh Circuit's decision recites at some length the post-discharge activities of Gilmer and Jackson, the court stated that these activities had nothing to do with the decision to deny enforcement (A. 3); therefore, we will not deal with post-discharge events herein.

The Decision Of The Court Of Appeals

The Teamsters Union declined to comply with the Board's order, and the Board sought enforcement in the United States Court of Appeals for the Seventh Circuit pursuant to Section 10(e) of the Act (A. 1).

In its decision in the enforcement proceeding, the Seventh Circuit, in an opinion by Hon. Howard T. Markey, Judge of the U.S. Court of Customs and Patent Appeals who was sitting by designation, declined to adopt the findings and reasoning of the Administrative Law Judge and the Board and denied enforcement of the Board's Order. Although the Seventh Circuit's decision appears to recognize that the wage protests of Gilmer and Jackson ordinarily would be considered concerted activity protected under Section 7 of the Act, the Court nevertheless refused enforcement because in its view, the "time, place and manner in which the demands were made" violated the "basic loyalty" which an employer has a right to expect from employees; consequently, the Court reasoned, the protected status of Gilmer's and Jackson's wage protests was thereby negated (A. 5).

The Seventh Circuit's concept of an employee's duty of loyalty to his employer was derived from *NLRB* v. *International Brotherhood of Boilermakers,* 581 F.2d 473 (5th Cir. 1978), a case cited at each point in the Court's opinion when the subject was discussed (A. 5,7). That case, however, involved an issue with respect to the relationship between the union and its members and did not deal with a union's obligation as an employer. In *Boilermakers,* the questioned action of the union was the removal of a union steward from his position for failure to comply with an internal union rule. The charge was filed under Section 8(b)(1)(A) which concerns itself with the unfair labor practices of a union *as a labor organization vis a vis* its membership. This poses questions entirely different from those involved in the present case, filed under Section 8(a)(1), which deals with the obligations of employers *vis a vis* employees. The

discussion of a union official's duty of loyalty to his union interprets the language of Section 8(b)(1)(A) which explicitly allows a union "to prescribe its own rules." The decision also refers to the Labor Management Reporting and Disclosure Act, 29 U.S.C. §411(A)(2), which guarantees to union members the right of free speech. The *Boilermakers* decision never refers to Section 8(a)(1) and does not deal with an employer's obligations to his employees - which is, of course, the subject of the instant case. The Teamsters Union is involved in the present case only as an employer, and the proceeding involves enforcement of Petitioners' rights as employees, and not as members, of the Teamsters Union. The Seventh Circuit appears not to have realized the fundamental distinction between Sections 8(a)(1) and 8(b)(1)(A) of the Act when it relied on the *Boilermakers* decision; its reliance appears to be misplaced and in fact mistaken.

The decision below also relies on Gilmer's and Jackson's asserted disregard of "established, proper, and known procedures for presenting wage complaints" without enunciating what those procedures were (A. 6). The record in the matter indicates not only that the procedures were quite vague but that Jackson and Gilmer on two separate occasions specifically sought to implement that procedure but were rebuffed by their Employer (A. 23, 27-28).

Finally, although the Seventh Circuit's decision adverts to its reviewing function, namely, to determine whether substantial evidence supports the Board's Order, its analysis shows that it has abandoned that standard. The ALJ concluded that the precipitating reason for Gilmer's and Jackson's discharges was their two protests—"Respondent would not have fired them but for these two incidents" (A. 15). Although the Seventh Circuit did not disagree with the ALJ's factual analysis (e.g., the Court agreed that the distribution of the letter at the civic luncheon was the "final straw" (A. 7)), it did substitute its judgment of these facts when it concluded that "the entire panorama of

events...constituted adequate and justifiable grounds for the present dismissals" (A. 6). An example of the tenor of the Seventh Circuit's approach is its misquotation of the ALJ's decision. The ALJ found that (A. 16):

> The plain thrust of the Gilmer-Jackson activity was to obtain wage relief for rank-and-file employees and I find *no reasonable basis for withholding the normal protections accorded such activity* [emphasis added].

The Court purported to quote this portion of the ALJ's decision as follows (A. 6):

> These events formed what the ALJ called "a reasonable basis for withholding the normal protections accorded" to wage relief activity.

The Court's decision ends with a characterization of the two protest actions as "continuing unproductive, internal and improper harassment," the very same conduct which the ALJ and the Board concluded was protected (A. 7).

In sum, the Seventh Circuit's decision denying enforcement of the Board's Order is based upon its own judgment that when concerted activity is harassing, unproductive, and improper, i.e., not raised at the time, place and manner of the employer's liking, the protections afforded by Section 8(a)(1) of the Act are lost.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With This Court's Decisions, With Decisions Of Other Courts Of Appeal, And With Decisions Of The National Labor Relations Board.

The Seventh Circuit's decision in this case, narrowly stated, holds that the protected status of Section 7 concerted activity is lost when an employee fails to follow the employer's procedures, however vaguely defined, for protesting terms and conditions of employment. Although this legal principle may well be based upon an erroneous factual premise since Gilmer and Jackson did attempt to follow those protest procedures, the decision adopting this principle is in direct conflict with the well established construction of the statute by this Court, by numerous courts of appeals, and by the National Labor Relations Board. Indeed, the decision is so inconsistent with the theory of Section 7 as to leave the meaning of that statute in a state of confusion.

The uniform interpretation of Section 7 protected rights, prior to this decision, was articulated by this Court in *NLRB* v. *Washington Aluminum,* 370 U.S. 9 (1962). That case, like the present case, involved protest activity (a walkout) by employees for which they were discharged; there, the protesting employees did not afford the company an opportunity to remedy the problem, a circumstance which caused the court of appeals to deny enforcement of the Board's order. This Court reversed. In its unanimous opinion, the Court stated (370 U.S. at 14):

> We cannot agree that employees necessarily lose their right to engage in concerted activities under §7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.

The employees' walkout action, taken without any prior protest to the employer, was held to be protected under Section 7; the opposite interpretation—requiring a specific demand to be made on the employer or, as in this case, requiring compliance with an employer's directive—according to the Court would "tend to frustrate the policies of the Act to protect the right of workers to act together to better their working conditions" and "would effectively nullify the right to engage in concerted activities which that section protects," particularly in situations involving unrepresented employees like Gilmer and Jackson who have no access to a formal and binding union-management grievance procedure.[4] The interpretation of Section 7 enunciated in *Washington Aluminum* has since been applied on some occasions by this Court,[5] on many occasions by courts of ap-

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[4] The Court noted that the employees had no bargaining representative and no established procedure by which a union could negotiate with their employer (370 U.S. at 15). This language has been interpreted to mean that employees who are in fact represented by a union cannot circumvent the union by spurning an established grievance procedure to settle labor disputes. *Emporium Capwell Co.* v. *Community Organization,* 420 U.S. 50 (1975). In *Dreis & Krump Mfg. Co.* v. *NLRB,* 544 F.2d 320 (7th Cir. 1976), where an employee who had a grievance pending distributed leaflets which the employer claimed were inflammatory and incited employees to engage in a walkout, the Seventh Circuit upheld the protected status of this leafletting since the activity did not contravene the union's grievance procedure but attempted to elicit support for the grievance. In the instant situation, of course, not only were Gilmer and Jackson unrepresented by any union and no grievance procedure existed, but, in addition, the leaflet which they distributed again requested a meeting with the Executive Board.

[5] *Eastex, Inc.,* v. *NLRB,* 437 U.S. 556, 567 (1978), holds that the distribution of a newsletter opposing a state's "right-to-work" law is protected activity citing *Washington Aluminum* for its interpretation of the meaning of Section 7; *cf. Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 18 (1980).

peals,[6] and on innumerable occasions by the Board.[7] *Washington Aluminum* has become a touchstone in the law of labor relations.

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[6] *Misericordia Hospital* v. *NLRB,* 623 F.2d 808 (2d Cir. 1980), circulation of report criticizing hospital held protected; *NLRB* v. *McCaffrey,* 619 F.2d 620 (6th Cir. 1980), work stoppage to protest low wages and no prior complaint to employer held protected; *NLRB* v. *Empire Gas, Inc.,* 566 F.2d 681 (10th Cir. 1977), letter to fellow employees urging a work stoppage with no prior complaint to employer held protected; *NLRB* v. *Long Beach Youth Center,* 591 F.2d 1276 (9th Cir. 1979), work stoppage without prior notice held protected; *NLRB* v. *Waco Insulation,* 567 F.2d 596 (4th Cir. 1977), discharge for insubordination when presenting wage demand held protected; *Hugh H. Wilson Corp.* v. *NLRB,* 414 F. 2d 1345 (3rd Cir. 1969) *cert. den.* 397 U.S. 935 (1970), objections to failure to contribute to profit sharing plan held protected; *NLRB* v. *C J Krehbiel Co.,* 593 F.2d 262 (6th Cir. 1979), walkout protesting work assignment without prior protest held protected; *NLRB* v. *Gulf-Wandes Corp.,* 595 F.2d 1074 (5th Cir. 1979), refusal to work overtime violating plant rule held protected; *NLRB* v. *Modern Carpet Industries,* 611 F.2d 811 (10th Cir. 1979), refusal to work on material believed to be radioactive held protected.

[7] *Louisiana Council No. 17, AFSCME,* 250 NLRB No. 72 (1980), union-employer's suspensions of union staff for disloyalty in holding protest meeting held to be an unfair labor practice; *Hawthorne Mazda, Inc.,* 251 NLRB No. 38 (1980), discharge for insubordination during discussion of wage rates with management held protected; see numerous cases cited therein; *Audio Systems, Inc.,* 239 NLRB 1318 (1979), walkout held protected, rejecting defense that no demand had been made on employer; *Ontario Knife Company,* 247 NLRB No. 168 (1980), individual employee's walkout in violation of plant rule to protest job assignment held protected; *Vic Tanny International,* 232 NLRB 353 (1977), walkout protest held protected, rejecting defense of insubordination; *Walker Methodist Center,* 227 NLRB 1630 (1977), leaving work place held protected even though no protest had yet been made; *P.B. and S. Chemical Co.,* 224 NLRB 1 (1976), protest walkout held protected; *Trumbull Asphalt Co.,* 220 NLRB 797 (1975); *Robertson Industries,* 216 NLRB 361 (1975), one day protest work stoppage without any prior protest to employer held protected; *Go-Lightly Footwear Inc.,* 251 NLRB No. 8 (1980), walkout in support of discharged employee held protected; *Koch Supplies, Inc.,* 249 NLRB No. 160 (1980), employee's complaints about wage policies held protected; *Hilton Hotels Corp.,* 248 NLRB No. 31 (1980), informally questioning change held protected.

The decision in this case does not refer to *Washington Aluminum* or its progeny possibly because it applies a standard which is at war with those decisions. Gilmer's and Jackson's protest statement and their protest leaflet were measured against a standard which permitted an employer "to free itself of unproductive, internal and improper harassment." The employees' walkout in *Washington Aluminum,* which violated a plant rule forbidding employees to leave their work without permission, was measured against a standard which prohibited an employer from discharging employees who engaged in a work stoppage clearly regarded as unproductive and improper by the employer, because that action was concerted activity which Section 7 protects. The theory of the decision in this case is that while some protest action may be protected, this concerted activity was "improper harassment" particularly when established protest procedures are disregarded.

The decision does not refer to any precedents to support its novel interpretation of Section 7. Only two cases are cited in the body of the decision: one, *NLRB* v. *International Brotherhood of Boilermakers,* 581 F.2d 478 (5th Cir. 1978), as noted above, deals with Section 8(b)(1)(A) of the Act rather than Section 8(a)(1), a circumstance apparently overlooked by the Seventh Circuit. The second case cited, *Liberty Mutual Insurance Company* v. *NLRB,* 592 F.2d 595, 605 (1st Cir. 1979), involved an employee who used the threat of continued protected activities as a weapon to redress his personal grievance; the court viewed this "personal rebellion" against the employer as indefensible because it interfered with the employee's job duties. The characterization of certain activities as "indefensible" because they are unlawful, violent, or in breach of contract or because they show a disloyalty to the employer[1] was mentioned by the

[1] The type of disloyalty which renders an employee's conduct "indefensible" was defined in *NLRB* v. *International Brotherhood of Electrical Workers,* 346 U.S. 464, 476-77 (1953), to mean activity which is unrelated to wages, hours or working conditions and which essentially is an "attack" on the policies of the employer unrelated to

(continued on next page)

Court in *Washington Aluminum* (370 U.S. at 17) which concluded that the walkout in that case could not be classified as indefensible by any recognized standard of conduct. Unlike *Liberty Mutual,* the decision in this case does not particularize which if any of Gilmer's or Jackson's conduct fell outside the boundaries of protected conduct; indeed, the *Liberty Mutual* case is cited only for the broad proposition that an employer's legitimate business interest ought to be considered. There is simply no "recognized standard of conduct" by which Gilmer's and Jackson's presentation of wage complaints can possibly be characterized as "indefensible."[9]

In sum, the Seventh Circuit's decision holds that an employer may dictate the time, place, and manner in which protected activity occurs; an employee who uses other methods such as Jackson's oral statement or Jackson's and Gilmer's peaceful distribution of a leaflet to Executive Board members is, according to this decision, disloyal and improperly harassing to the employer. Judged by this standard, surely the walkout in *Washington Aluminum* would be deemed unprotected since, unlike this case where Jackson and Gilmer did not attempt to follow the "established procedure," there was no effort what-

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(footnote 8 continued)

any labor controversy and "made in the interest of the public rather than that of the employees." This is hardly the present situation where Jackson's and Gilmer's activity specifically concerned wages and "the plain thrust of the activity was to obtain wage relief for rank-and-file employees"; *see Misericordia Hospital* v. *NLRB,* 623 F.2d 808 (2d Cir.1980), where the Second Circuit rejected the claim that a report critical of hospital practices was disloyal.

[9] The record establishes that Jackson made his comments at the stewards meeting only after obtaining Peick's permission to speak (A. 2); there is no evidence that any disturbance was caused. The record is devoid of any evidence to indicate that the men distributed or even showed copies of their letter to individuals attending the luncheon other than three or four Executive Board members (A. 14). Their statements were specifically related to the subject of wages and did not attack any Teamsters Union policies unrelated to their wages.

soever to communicate with management prior to the walkout. The fundamental principle enunciated in *Washington Aluminum* that "the language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time [any] demand is made" (370 U.S. at 14), if anything, means that no particular employer directive can determine the manner in which protected activity occurs. The Seventh Circuit's decision stands in direct conflict with this well established and uniformly followed principle. It should be reversed.

II. The Seventh Circuit's Decision Erodes A Fundamental And Established Statutory Principle Which, Unless Reversed, Will Constitute A Serious Hindrance To The Effective Administration Of The National Labor Relations Act.

The ambit of Section 7 of the National Labor Relations Act is broad and protects all kinds of concerted activity by employees for their mutual aid or protection. In this case, it is undisputed that the subject matter of Gilmer's and Jackson's protests—the presentation of wage complaints—was protected concerted activity; indeed, there are few issues more essential to the fabric of labor-management relations than the subject of wages. Yet, because of the manner in which these protests were made, the Seventh Circuit decided that the statutory protections accorded protected activity in Section 8(a)(1) of the Act were lost. The manner of these protests which the Seventh Circuit found offensive was not that the protests were unlawful, violent, in breach of contract, or indefensible as those terms have been defined in the case law (see discussion *supra,* at pp. 12-13); rather, the protests were offensive to the Court because the manner of these protests allegedly did not conform to an "established procedure" which their employer, the Teamsters Union, allegedly had promulgated or would prefer to resolve wage matters; by not following this procedure, the employees' actions were improper, disloyal and harassing to their employer, according to the Seventh Circuit.

The gloss which the decision below places on Section 7 protected rights is nowhere supported in the extensive caselaw interpreting Section 7 and, on the contrary, contravenes the decisions of this Court and others.

The effect of this decision, if allowed to stand, is that an employer unilaterally may dictate the time, place, and manner in which protected activity can occur, and any employee acts at his peril if he fails to follow that procedure. Presumably walkouts, the distribution of letters or leaflets, holding meetings, and other such commonly accepted methods of employee protest would be unprotected, if an employer dictated another procedure to be followed, however vague or ineffectual that procedure might be. In the Seventh Circuit's view, concerted actions conducted otherwise than as the employer prescribed would be viewed as improper, disloyal and harassing and thus unprotected.

It is not an exaggeration to state that the Seventh Circuit's decision substantially erodes fundamental and commonly exercised rights of employees to engage in protected concerted activity; it limits avenues of employee protest to a framework designed and controlled by employers. Until that decision was issued, this had never been the law and, we respectfully submit, should not be allowed to stand.

CONCLUSION

For the foregoing reasons, Petitioners George Gilmer and James Jackson pray that this petition be granted and that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2348

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION, LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board.

ARGUED APRIL 29, 1980—DECIDED SEPTEMBER 3, 1980

Before WOOD and CUDAHY, *Circuit Judges,* and MARKEY, *Chief Judge.**

MARKEY, *Chief Judge.* The National Labor Relations Board (NLRB) petitions for enforcement of its order against the Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) directing reinstatement and back pay for George Gilmer and James Jackson. Enforcement denied.

* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

Background

Gilmer and Jackson were dismissed from their jobs as business representatives of the Union on April 11, 1977. The Union says they were dismissed for poor job performance, for engaging in personal business during work time, and for insubordinate conduct. The NLRB says Gilmer and Jackson were dismissed while participating in activities protected by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*

On April 4, 1977, at a monthly Union stewards meeting attended by members of the Union's executive board, its business representatives, and stewards from the shops the Union had organized, Jackson asked Peick, the executive officer of the Union, for permission to speak. Obtaining Peick's permission, Jackson began discussing the wages paid the Union staff and requested pay increases for the entire staff. Peick told Jackson that a shop stewards meeting was not the proper time or place to discuss staff salaries. Peick then asked Gilmer if he was involved in the request and was told by Gilmer that he was. Witnesses for the Union testified that Peick told the two men to discuss their salaries with the Union's executive board if they were unhappy. As the meeting ended, Peick asked the two men to be in his office the next morning at 8 a.m. Gilmer and Jackson did not contest that description of events, but testified Peick became angry and told them they were fired at the meeting.

A member of the executive board testified that he heard Gilmer and Jackson discussing their wage complaints over the company CB radio and that he interrupted, telling them the CBs were not to be used for such purposes, and that if they had complaints they should see Peick personally. Gilmer and Jackson did not deny that testimony, but testified they heard Peick talking by radio to members of the executive board after the meeting, and that he said he was going to "straighten out this black bastard once and for all."[1]

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[1] That allegation did not appear in the affidavits filed with the NLRB by Gilmer and Jackson.

On the morning of April 5, Gilmer and Jackson, meeting with Peick and other members of the executive board, were told not to use the radios for personal business and that they would get a raise when they earned one.

On April 11, 1977, during a political luncheon honoring Chicago's Mayor Bilandic at a hotel, Gilmer and Jackson distributed a letter repeating their wage demands to members of the executive board seated at various tables with other attendees.

After returning from the luncheon, the board reviewed the work records of Gilmer and Jackson and recommended to Peick that they be dismissed. Pieck discharged them that afternoon, telling them they were fired for insubordination. Gilmer's and Jackson's work records reveal both had been remiss in their duties in the past, culminating in a December, 1976 board recommendation that they be dismissed, with Peick deciding instead to issue a warning and give the two men a "second chance."

After their discharge, Gilmer and Jackson picketed the Union's offices repeatedly from May through November 1977. In July, Gilmer and Jackson, posing with picket signs, met with a television news crew in front of Peick's home. In September, Gilmer and Jackson placed picket signs in front of Peick's house and distributed pamphlets to Peick's neighbors. The pamphlets contained a cartoon of Peick, whip in one hand, standing on a prostrate Gilmer while strangling Jackson with his other hand.

In October and November, at the Union hall and at job sites of Union-represented employees, Gilmer and Jackson handed out leaflets concerning a suit by another Union employee involving Peick and the Union's Pension Fund. The leaflet contained this statement:

> UNION BOSS ROBS AND STEALS FROM UNION ME 1BERS
>
> LOUIS F. PEICK—SEC. TREAS. OF LOCAL #705 HAVE [sic] NOT STOPPED STEALING AND ROBBING FROM MEMBERS YET!!! HE

ROBBED AND STOLE MR. JACKSON [sic] AND MR. GILMER'S PENSION: HEALTH AND WELFARE AS WELL AS THEIR LIVELIHOOD. YOUR UNION AGENT WOULD LIKE TO SERVE YOU MORE BUT, HE CAN'T DO ANYMORE THAN MR. LOUIS F. PEICK LET [sic] HIM. CALL MR. PEICK AT 738-2800 AND CHECK YOUR PENSION.[2]

On September 27, 1977, Gilmer and Jackson filed unfair labor practice charges with the NLRB. After a hearing, the NLRB Administrative Law Judge ruled that they had been engaged in protected activity at the time of their dismissal and ordered their reinstatement and reimbursement for back pay. The NLRB adopted that opinion with minor modification.[3]

OPINION

An order of the NLRB will be enforced by this court if there is substantial evidence in the record supporting it. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Gogin*, 575 F.2d 596, 601 (7th Cir. 1978); *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978). Fear of an accusation that it is substituting its judgment for that of NLRB should not, however, so enervate a court as to substitute judicial abdication for judicial review. *See Liberty Mutual Insurance Co. v. NLRB*, 592 F.2d 595, 602 (1st Cir. 1979).

The Administrative Law Judge (ALJ) found that Gilmer and Jackson were engaged in "concerted activities concerning terms and conditions of employment,"

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[2] Peick sued Gilmer and Jackson for libel based on that statement and was awarded summary judgment on the issue of liability, *Peick v. Gilmer and Jackson*, 78 L. 5014, Circuit Court of Cook County, Illinois.

[3] Because we hold the NLRB order unsupported by substantial evidence that the discharge was unjustified, we do not reach the question of whether reinstatement was appropriate. Nor is there need to discuss the post-discharge activities of Gilmer and Jackson.

and would not have been fired "but for" those activities. Viewing the "plain thrust" of those activities as an effort to "obtain wage relief," the ALJ dismissed the argument that the wage complaints were inappropriately presented, finding "no reasonable basis for withholding the normal protections accorded such activity."

The actions of Gilmer and Jackson were among the events involved in their dismissals, but we cannot find that those actions, taken as a whole, were merely "concerted activities for the purpose of collective bargaining or other mutual aid or protection" protected by Section 7 of the National Labor Relations Act, or that the wage demand element in those actions so influenced the dismissals as to achieve "but for" status. Nor can it be said that a mere characterization as related to wage demands requires a total disregard of the time, place, and manner in which the demands were made, or of the job performances of the dismissees.

This case does not involve an employer engaged in anti-union activity, nor does it involve employee dismissal for attempted union organizing. If the "thrust" of the employees' actions were here toward obtaining salary increases for themselves and other members of the union staff, their right to petition for wage increases must nonetheless be balanced against the employer's right to expect a basic loyalty on the part of employees in the performance of their assigned duties. *See NLRB v. International Brotherhood of Boilermakers*, 581 F.2d 473, 478 (5th Cir. 1978).

Whatever balancing process may or may not have been here performed by the ALJ and the NLRB, articulated or *sub silentio*, we do not find substantial evidence that either engaged in the required balancing process. That wage demands were denied without discharge on April 5 would tend to negate hostility of the Union toward wage demands alone. That wage demands were made does not conflict with a dismissal for poor performance, for personal business during work time, and for insubordination. The balancing process requires more than a talismanic approach based on the mere articulation of a wage demand.

That employees are protected while presenting wage complaints does not give them carte blanche in choosing the method of presentation, or in their choice of time and place for making those complaints. Gilmer and Jackson had been employed by the Union for 14 and 8 years, respectively. They were fully informed of the established procedure to follow in seeking wage increases. They had attended earlier stewards meetings and knew the purpose of those meetings. Yet they elected to disregard established procedures and to present wage complaints at a meeting attended by stewards who are not employed by the Union, to the potential embarrassment of the Union and its leader who was conducting the meeting. Nonetheless, the Union leader met with them the next morning and told them they would be given a raise when their work indicated they deserved it. Six days later they again disregarded established procedures and passed out wage complaint letters to the board members at the Bilandic luncheon, again to the potential embarrassment of the Union.[4]

Thus the substantial evidence in the record not only fails to support the NLRB order but illumines justification for the dismissals involved. The injection of salary complaints at the stewards meeting, the admittedly improper use of the CB radios, the presentation of wage complaint letters at a civic luncheon, the general and repeated failure and refusal to follow established, proper, and known procedures for presenting wage complaints, coupled with the poor prior work records of Gilmer and Jackson, for which they had been given prior warnings and a "second chance," formed what the ALJ called "a reasonable basis for withholding the normal protections accorded" to wage relief activity. When the entire panorama of events, not just the goals expressed, is viewed, it is clear that those events constituted adequate and justifiable grounds for the present dismissals.

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[4] Gilmer and Jackson say they didn't show the letters to other civic leaders seated with each board member, but cite no adequate reason for ignoring and by-passing normal channels, e.g., the U.S. Postal Service.

The Union "went along," but with a warning, after the earlier discussion of poor performance. It "went along," but with a reminder of impropriety, after the stewards meeting. It "went along" after the CB radio warning. The luncheon event was the final straw. An employer should not be penalized for good-heartedness with employees who choose to flout its rules and ignore its warnings. The National Labor Relations Act is directed toward recognition of the legitimate rights of both employers and employees, 29 U.S.C. § 141(a). There must be room in the law for a right of an employer somewhere, some time, at some stage, to free itself of continuing, unproductive, internal, and improper harassment.[5]

The NLRB failed to consider the legitimate business interest of the Union involved in its dismissal of Gilmer and Jackson, *Liberty Mutual Insurance Co. v. NLRB*, 592 F.2d 595, 602 (1st Cir. 1979), or to balance the employee's right to petition against the employer's right to performance of assigned duties in a loyal manner, *NLRB v. International Brotherhood of Boilermakers*, 581 F.2d at 478.

Because we find the dismissals were justified and not in retaliation for protected activity, enforcement of the NLRB order is *denied*.

ENFORCEMENT DENIED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] That the employer here is a union is of no moment. No reason appears for viewing, or applying, the law differently in relation to different employers.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 13-CA-16890

Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and

George Gilmer and James Jackson, Individuals

DECISION AND ORDER

On May 16, 1979, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified here.[1]

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[1] See *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified.

1. Substitute the following for paragraph 1(b) of the Administrative Law Judge's recommended Order:

"(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer George Gilmer and James Jackson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole as set forth in "The Remedy" section above for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest."

3. Substitute the attached Notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 4, 1979

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 13-CA-16890

Truckdrivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and

George Gilmer and James Jackson, Individuals

Douchan Pouritch, Esq., for the General Counsel.

Sheldon Sharone, Esq., and *David Matthews, Esq. (Cornell & Sharone, Ltd.*, Chicago, IL), for Respondent.

DECISION

Statement of the Case

RALPH WINKLER, Administrative Law Judge: A hearing in this matter was held upon a complaint issued by the General Counsel and an answer filed by Respondent Local 705. No jurisdictional questions were raised, and all parties agree that Respondent labor organization is an employer within Section 2(6) and (7) of the Act.

Upon the entire record in the case, including my observation of the demeanor of witnesses and upon consideration of briefs, I make the following:

Findings of Fact

The Unfair Labor Practices

This case involves the discharge by Respondent Local of business representatives George Gilmer and James Jackson on April 11, 1977. (All dates are in 1977 unless otherwise stated.) Louis Peick, the Secretary-Treasurer and executive officer of Respondent, made the decision to fire Gilmer and Jackson and notified them of their termination. It is noted, at the outset, that Peick did not testify in this proceeding.

Respondent Local conducts its organizational activities and has collective-bargaining agreements in the Chicago area. Respondent employs the usual staff of a large union to carry out organizing functions and to service collective-bargaining agreements. Gilmer and Jackson were among some 25 business reprsentatives employed by Respondent.

Although Respondent claimed at the hearing that, as union business representatives, Gilmer and Jackson were "managerial" personnel and therefore beyond the Act's protection, the record contains no substantial evidentiary support for such "managerial" contention. Nothing more need be said on this point in finding, as I do, that Gilmer and Jackson were employees under the Act and that they were not managerial employees as that classification is defined in *N.L.R.B.* v. *Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 288 (1974).

The discharges

Respondent claims that it terminated Jackson and Gilmer on April 11, 1977, for poor job performance, for engaging in personal business during working time, and for insubordinate conduct. At the time of their discharge, Jackson and Gilmer had been serving Respondent as business representatives for more than 8 and 14 years, respectively. Respondent witness Louis

Fina testified that he has responsibility for maintaining telephone radio contact with business representatives in the field, that representatives are required to call Respondent's office each day from the field and to answer calls from the union office, and that Gilmer failed to maintain such contact each working day for 7 years. According to Fina, business representatives are also required, among their duties, to make a weekly distribution of "sick-checks" to sick members in its organized shops and Fina testified that Gilmer was remiss every week in this regard for 10 years. Respondent also adduced testimony, unnecessary to explicate, to the effect that Gilmer was remiss in paying traffice tickets while operating union-owned vehicles and that he and Jackson used the two-way telephones in the Union's cars for personal conversations. David Ligurotus and John Navigato, Members of Respondent's executive board, testified that the executive board recommended to Secretary-Treasurer Peick in December 1976 that Gilmer and Jackson be fired for poor performance but that Peick decided to give them a "second chance." In separate letters to Jackson and Gilmer dated December 27, 1976, Peick recalled his previous criticism of their job performance and the letter concluded with, "If your work doesn't improve within the next few weeks, please consider resigning or the alternative of being discharged, whichever you please."

Peick regularly conducts monthly meetings — so-called "stewards" meeting — attended by Respondent's officers and executive board members, business repsentatives, and those employees of companies under contract with Respondent who are shop stewards in those shops. The only purpose of these stewards meetings is to discuss the ongoing administration of the contract shops.

Gilmer and Jackson attended a stewards meeting on April 4. At that meeting Jackson requested and was given Peick's permission to speak. Jackson thereupon rose and, in effect, complained to Peick that Respondent's own staff employees were

being paid less than staff members of another Teamsters Local and less than many employees of companies under contract with Respondent; Jackson also remarked that Respondent's executive board recceived less than the executive board of the other Local. (Jackson and Gilmer had agreed before the meeting that Jackson would make these remarks.) Peick told Jackson this was not the time and place for comments about staff wages and, according to Jackson and Gilmer, Peick shouted to Jackson, "that's it, you're fired." Addressing Gilmer, according to Gilmer and Jackson, Peick said, "you're in this too?" and that, when Gilmer said he was, Peick purportedly told Gilmer, "you're fired too." (Respondent adduced testimony to the effect that Peick did not make these "firing" statements, and it is unnecessary in resolving this case that this credibility conflict be determined.) The meeting ended, and while leaving the conference room Peick told Jackson he was an "ungrateful bastard" and that Jackson and Gilmer should be in his (Peick's) office at 8 a.m. the next morning. Jackson testified that later that day he and Gilmer were in Gilmer's car and that, on the two-way radio in the car by which telephonic contact was maintained with Respondent's office, they overheard Peick addressing by name and saying to executive board members Danny Ligurotus, Navigato and Peter Janopolous, "The idea of those guys talking about raises. I'm going to straighten this black bastard out once and for all."[1] (Jackson and Gilmer are black.) The next morning, Jackson and Gilmer reported to Peick's office as Peick had instructed, and Peick assigned them organizing functions other than what they had been doing on April 3. They continued performing these regular organizing functions until April 11.

A community luncheon honoring Chicago's new mayor was scheduled for April 11. It was a big affair attended by community

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[1] As Respondent points out, this purported statement does not appear in Jackson's affidavit.

leaders, celebrities, and individuals from all walks of community life. (One witness estimated that several thousand persons were present.) Respondent officials attended the luncheon, and that same morning Jackson and Gilmer and other staff members were also directed to attend in their union capacity; Respondent paid for the staff members' tickets. Sometime before going to work that day, Jackson and Gilmer had drafted, signed, and made copies of a letter, dated April 11, addressed to Peick and Respondent's executive board. (This April 11 letter is set forth in Appendix A, attached hereto.) At Respondent's offices that same morning, Jackson and Gilmer gave copies of the letter to two business agents. Respondent officials did not sit together at the luncheon for the mayor, but were dispersed at tables with other attendees. During the luncheon, Jackson and Gilmer went up to the tables where executive board members Ligurotus, Janopolous, Navigato, and Katzy were sitting, and gave each of them a copy of the April 11 letter. There was no showing that Jackson and Gilmer distributed or showed copies of the letter at the luncheon to individuals other than the executive board members.

Executive board members Navigato and Ligurotus testified that upon returning to Peick's office after the April 11 luncheon, the executive board reviewed with Peick the work records of Jackson and Gilmer and that the executive board recommended that Peick discharge both men because of their job performance and also because of the "disturbance" created by Jackson at the April 4 stewards meeting and the "embarassment" which Jackson and Gilmer caused the Respondent by handing out copies of the April 11 letter to executive board members at the mayor's luncheon.

Peick decided to discharge Jackson and Gilmer, and that same afternoon (April 11) he summoned them to his office and fired them. Gilmer asked why and Peick replied that if he needed any reason it was "insubordination." Peick said nothing to them about their job performance.

A further word about the subject of wage increases raised by Jackson at the April 4 meeting. The record establishes that this matter concerned all Respondent's employees at the time and, according to a Respondent witness, "wages was a general conversation piece around the [union] hall."

On July 18, 1977, Jackson and Gilmer filed individual complaints with the Equal Employment Opportunity Commission alleging racial discrimination by Respondent in respect to various employment items including their respective discharges on April 11. These complaints are still pending. The charge in the present unfair labor practice case was filed on September 27.

Conclusions as to the discharges

As indicated above, there are credibility conflicts respecting some items herein. No matter which version be credited, however, undisputed facts plainly establish that the precipitating reason for the discharges was the handing out of the April 11 letter to executive board members at the mayor's luncheon and that both this incident and the occasion of Jackson's salary complaints at the stewards meeting contributed substantially to Peick's decision to fire Jackson and Gilmer. While Gilmer and Jackson may not have been the most satisfactory of employees,[2] I am satisfied that Respondent would not have fired them but for these two incidents. Cf. *Jays Foods, Inc.* v. *N.L.R.B.*, 573 F.2d 438 (C.A. 7, 1978), cert. denied 99 S.Ct. 176 (1978); *Construction, Production & Maintenance Laborers' Union etc. (William Pulice Concrete Construction)*, 236 NLRB No. 19 (1978), 98 LRRM 1182.

As shown above, the matter of wage increases was of general concern to Respondent's staff employees, and I find that Jackson and Gilmer were engaged in concerted activities concer-

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[2] Neither adequately explained, for example, the adverse implications of Peick's warning letter of December 29, 1976.

ning terms and conditions of employment, in raising such matter at the stewards' meeting and in the letter distributed at the mayor's luncheon. *Hugh H. Wilson Corporation,* 171 NLRB 1040 (1968), enf'd 414 F.2d 1345 (C.A. 3, 1969), cert. denied 397 U.S. 935; *Diagnostic Center Hosp. Corp.*, 228 NLRB 1215, 1217 (1977). Respondent contends that the activity was unprotected because both mentioned occasions were inappropriate for such purpose and were further unprotected because the reference to salaries paid union officers and executive board members constituted a "political attack to discredit and overthrow the leadership of Local 705" (Resp. Br., p. 10). The plain thrust of the Gilmer-Jackson activity was to obtain wage relief for rank-and-file employees, and I find no reasonable basis in the circumstances for withholding the normal protections accorded such activity. Cf. *Hugh H. Wilson Corp.* v. *N.L.R.B.*, 414 F.2d 1345, 1355-1356 (C.A. 3, 1969). I accordingly conclude that Respondent unlawfully discharged Gilmer and Jackson for engaging in protected, concerted activity.

Post-discharge events

Respondent asserts that Gilmer and Jackson forfeited whatever remedial rights they might otherwise have, even assuming they had been unlawfully discharged, because after their discharge they called Peick a thief, stated that union members' pensions were being stolen, and picketed Peick's residence in violation of an Illinois criminal statute. An Illinois statute makes it a class B misdemeanor to picket a private residence. There was no showing, at least since 1973, that any prosecutions were undertaken under this provision. No such action was brought against Gilmer or Jackson.

To protest their discharges, Jackson and Gilmer picketed at the site of Respondent's offices at various times from May until November 1977. One day in July 1977, Gilmer and Jackson arranged to meet in front of Peick's residence (in a residential area) with newscasters and a crew from three Chicago television

stations. With picket signs in their hands on that occasion they posed for the television crews for about 30 minutes. The signs read: "Union agents protest against boss of Local 705 I-B-T. Mr. Peick is unfair to his help." And once in September, Gilmer and Jackson distributed a pamphlet in the area of Peick's home and handed copies of the pamphlets to Peick's neighbors. This pamphlet (Resp. Exh. 7) contained various cartoons including one of Peick, a whip in hand and standing on a prostrate Gilmer, and the captions referred, among other things, to the discharge of Gilmer and Jackson and to wages paid Respondent's employees. On this occasion in September, Gilmer and Jackson also placed more than five pickets signs on public property in front of Peick's house and on a highway leading to his house. (These were the same placards they had used while posing for the television cameras.) Peick drove up and saw Jackson placing one of the placards in front of his house. Peick attempted to run over Jackson with his car, and Jackson told Peick that he had a family to feed and wanted to return to work. Peick replied "let them starve" and went into his garage and obtained and hurled a steel rod, 3 feet long, at Jackson and then he obtained a shotgun from his garage and threatened to use it on Jackson and Gilmer. Jackson and Gilmer fled.

Gilmer and Jackson handed out a single-page leaflet while picketing at the Union Hall in October and November. During this period, they also distributed the same leaflets to members of Respondent at several locations where these members were employed. These leaflets reproduced *verbatim* and article appearing in the *Chicago Sun Times* under the reporter's by-line concerning a legal action against Peick and Respondent Union's

Pension Fund. This was the *Daniel* case[3] involving an allegation of fraud under the "Securities Acts of 1933 and 1934." According to the Article, Daniel (a Respondent member) claimed Respondent had never informed him that he had to have uninterrupted work for 20 years to qualify for pension benefits. The leaflet (herein called the Daniel leaflet) also contained the following statement by Gilmer and Jackson.

> UNION BOSS ROBS AND STEALS FROM UNION MEMBERS
>
> LOUIS F. PEICK - SEC. TREAS. OF LOCAL # 705 HAVE NOT STOPPED STEALING AND ROBBING FROM MEMBERS YET ! ! ! HE ROBBED AND STOLE MR. JACKSON AND MR. GILMER'S PENSION: HEALTH AND WELFARE AS WELL AS THEIR LIVELIHOOD.
> YOUR UNION AGENT WOULD LIKE TO SERVE YOU MORE BUT, HE CAN'T DO ANYMORE THAN MR. LOUIS F. PEICK LET HIM. CALL MR. PEICK AT 738-2800 AND CHECK YOUR PENSION.

Both Gilmer and Jackson had an involuntary break in employment in or about 1971, and the General Counsel asserts that the *Daniel* case would affect their pensions because of their 1971 work interruption.[4]

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[3] *Daniel* v. *Intn'l Bro. of Teamsters, etc.*, 561 F.2d 1223 (C.A. 7, 1977). Reversing the court below, the Supreme Court has since held that the SEC anti-fraud rules were inapplicable, ____ US ____ (1979) 100 LRRM 2260.

[4] Peick has filed a defamation action in State Court against Gilmer and Jackson for publishing the Daniel leaflet. This suit is still pending.

Conclusions respecting remedy

Jackson and Gilmer had a dual role respecting Respondent. First, they were wrongfully discharged employees and were entitled to protest their discharge in an effort to regain their jobs. Second, as members of Respondent with a substantial interest in the Pension Plan, they had a legitimate stake in the controversy involved in the *Daniel* case because their earlier separations had interrupted the continuity of their employment. In connection with Jackson's and Gilmer's latter role as employees engaged in a labor dispute with their employer respecting pensions, the Supreme Court has observed that "Labor disputes are ordinarily heated affairs" and that "cases involving speech are to be considered against the background of a profound commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks. [citation omitted] Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate and reckless untruth." *Linn* v. *Plant Guard Workers Local 114*, 383 U.S. 53, 62-63 (1974). I cannot find that any of Gilmer's and Jackson's statements were *deliberately* or *recklessly* false.

Different standards are applicable where an employer seeks to justify an "orginal discrimination" and where he seeks "to be excused from his obligation to reinstate or to pay backpay to a discriminatee." *M. Restaurants Incorporated, d/b/a The Mandarin*, 228 NLRB 930, 931-932 (1977). The latter situation is an "extraordinary measure" and an "evaluation of post-discharge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge." *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), quoting from *N.L.R.B.* v. *M & B Headware Co., Inc.*, 349 F.2d 170, 174 (C.A. 4, 1965), that "The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression."

In view of the wrongful discharge of Gilmer and Jackson and the contemporaneous expression of racial epithets against them, I conclude that this case hardly presents the extraordinary situation in which they should be denied the normal relief for the discrimination against them.

Conclusions of Law

1. Respondent is an employer within Section 2(6) and (7) of the Act.

2. Respondent discharged Gilmer and Jackson in violation of Section 8(a)(1) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action, including reinstating and making whole Gilmer and Jackson in order to effectuate the policies of the Act. All backpay computations shall be in accordance with *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB 651 (1977).[5]

Upon the foregoing findings, conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[6]

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[5] See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962), enforcement denied on other grounds 322 F.2d 913 (C.A. 9, 1963).

[6] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent Truckdrivers, Oil Drivers, Filling Station and Platform Workers Union, Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for concertedly seeking wage increases.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to George Gilmer and James Jackson reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole as set forth in "The Remedy" section above, for any loss of earnings suffered as a result of the discrimination against them.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(c) Post at its offices in Chicago, Illinois, the attaached notice marked "Appendix B."[7] Copies of said notice, on forms pro-

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[7] In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

vided by the Regional Director for Region 13 of the Board, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. May 16, 1979

/s/ Ralph Winkler
Administrative Law Judge

Appendix A

April 11, 1977

TO THE EXECUTIVE BOARD OF LOCAL #705 AND MR. LOUIS PEICK

Dear: Mr. Peick:

There were statements made by me in the steward's meeting Monday evening April 4, 1977 which forces me to explain my position to you and the executive board, because of the attitude you took on the floor, along with your attitude the following day which prompted a letter written and not signed by you to me.

Mr. Peick you had a golden opportunity to upgrade President Frank Kraky and the entire executive board by the statements made by me. You also would have been able to upgrade the men who have just recently started working for our local as well as every other agent.

I made the statement about the cost of living and the pay which Local 743 is paying its executive board which is ranging from 23 to 30 thousand dollars more than Mr. Frank Kraky who has been with out local for approximately forty (40) years and who has also assisted you in your administration for twenty (20) years and 3 days.

Mr. Peick don't your realize that it's wrong not to take care of him and the people who are faithful to you and this Union?

Mr. Peick: President Frank Kraky, Vice-President Louis Esposito, Sam Canino, Joseph Desmyter, Peter Janopolous, John Navagato, Don Heims, Edward Coco, Daniel Ligurotis and James Angus,. These men who are faithful to you as well as to our local should be paid well or as well as local #743 is paying its board.

I've decided that I'm not going to do what some people may decide to do for I love you too much to stand by realizing that you're not doing what is right and talk about you behind your back and laugh in your face and not tell you of your wrong.

Mr. Peick it is wrong and a sin before God for you to call men off the trucks and pay them from 8 to 13 thousand dollars a year less than what they were making driving trucks and then tell them to represent people who are making approximately 8 to 13 thousand dollars more than they are. Louie, it's my desire to speak to the entire board as soon as possible. *STOP* making idle promises when you know that you don't mean them. Please stop saying unbecoming things about me behind my back such as going to George Gilmer talking about James F. Jackson and vice-versa. This situation is wide-spread and should cease because it creates chaos in a Union. You know why you give some men more work than they can handle, (so they can't perform properly and you can say, "they're not taking care of their work); Then some men none at all so you can say, (they aren't working). Therefore, you are the boss and you are directly responsible for this entire situation which is giving you a bad

name, believe it or not most of it is because you refuse to pay your men well, you refuse to recognize their talents and you just want to be the whole show!

I suggest that you pay your entire board not less than 55,000 thousand dollars per year, all new men with less than 6 years as an agent 60 hours of a truck driver's pay, that's with 20 hours at the time and a half and all men with 6 years of more in our local as agents 65 hours of a truck driver's pay.

It has been said that all bosses are the same and that they want to see how much they can make but how little they can pay others. Louie don't be that way.

Yours Truly,

/s/ James F. Jackson
/s/ George Gilmer

APPENDIX D
TRANSCRIPT OF PROCEEDINGS
Testimony of James Jackson

[8] Q Was this a regularly scheduled meeting?

A Yes, they usually have it once a month.

Q Who was attending the meetings?

A The stewards, business representatives and the Executive Board of our Union.

Q How many business representatives were there?

A I imagine that it was about maybe 15 or 20 business representatives. With the Executive Board and all it must have been about 150 or more people there.

Q Of the 150 people, how many were employees of the union?

A They were all employees of the union, just some of them was stewards. They had other jobs too but yet they were paid by the union.

* * *

[13] Q Did you come to work on April the 5th, 1977?

A Yes, the following day, April the 5th I did come to the office.

Q Did you go to Peick's office?

A Yes, I was there. Mr. Peick wanted to see Mr. Gilmer and myself at 8:00 o'clock. And I was there that morning about 6:30 to see him.

Q Okay. Did you see him?

A Yes, sir.

[14] Q Where?

A In his inner office.

Q Who was present?

A Mr. Gilmer, myself, Mr. Peter Janopoulos, Mr. Danny Navigato, Mr. Ligurotus and Mr. Peick.

Q And what was said at that meeting, if anything?

A Well, at that meeting Mr. Peick made us aware that we was not to work on the J.C. Penney strike any longer, that we was going to organize the gas station.

And with this here Mr. Peick told Mr. Gilmer and I that and that was it. He dismissed us. And then he asked me to make plain what I had said on the April 4th meeting night. And I did this.

Q What did you say?

A Well, I told him that what I had said was that the new men that was working for our local lost from eight to $13,000 a year. And that the cost of living was still going up and that our Executive Board, especially Frank Kratky, made much less than the Executive Board on the fourth floor and that we all needed a raise.

* * *

[46] Q Mr. Jackson, you gave out some, General Counsel's Exhibit No. 2, that is the letter of April 11 at the Bilandic luncheon. You gave out some of those letters to members of the Executive Board at Local 705?

A Right.

Q Why didn't you give all of those letters out at Local 705? Why did you use the Bilandic luncheon to give it out?

JUDGE WINKLER: Does it make any difference?

MR. CHARONE: Yes, it does.

JUDGE WINKLER: As to the witness's reason for doing it?

MR. CHARONE: Yes.

JUDGE WINKLER: All right.

THE WITNESS: I didn't plan to given them out at the Bilandic luncheon. I planned to give them to everyone after we returned. But one of the agents made us aware, Mr. Gilmer and myself, aware that there was a misunderstanding about what was said about Frank Kratky and that he felt that some people felt that it was said that Frank Kratky had been around there 40 years and had never done any work. And they [47] felt I said that. And the person say he knew I didn't.

But he said, "You better pass those leaflets out right away." So I gave them to members of the Executive Board to try to make plain what was said on the April 4th meeting night.

* * *

[50] Q Okay. In that letter on page 2 you said it is your desire to speak to the entire Board as soon as possible. I would ask you why you didn't ask Mr. Peick on the morning of April 4th for an opportunity to speak to the Executive Board?

A I did.

Q On April 4?

A Yes, sir.

Q Would you tell me who was present?

A Mr. Gilmer, myself, Peter Janopoulos, Mr. Navigato, and Mr. Danny Ligurotus.

Q And that is on April 4th?

A Right. April 5, I am sorry, April 5.

Q On April 5 what did you say?

A I told him I would like to speak to the entire Board as soon as possible.

Q And what response was made?

A "I know you would like to speak to the Board."

[51]JUDGE WINKLER: Who said that?

THE WITNESS: Mr. Peick.

Q (By Mr. Charone) Was there anything else said?

A He laughed.

* * *

Testimony of Donald Heim

[170] Q Mr. Heim, I'm going to ask you in the year 1977 did you have occasion to discuss wages or wage increases with Mr. Jackson?

A Wages was a general conversation piece around the hall.

JUDGE WINKLER: That was an interest to everyone, wasn't it?

THE WITNESS: Yes, it was.

Q (By Mr. Charone) Did you have anything in particular that you can recall now in your discussion with Mr. Jackson about wages and what to do?

A We told Mr. Jackson and everybody else to go into the front office just like I do.

Q What do you mean by "go into the front office"?

A Get a private audience with Mr. Peick, speak your peace there.

* * *

Testimony of Peter Janopoulos

[187] ... I said, "Cut it out. For Gods sake, grow up. If you have got any problems, go up and see the Old Man." That was it.

* * *

Testimony of Daniel Ligurotus

[212] Q (By Mr. Charone) Was the subject of wage increases raised?

A I believe they questioned him about the wages. I think there was a mention of wages that morning, but I remember that Mr. Peick said, "If you wanted more [213] money, you should have come in here and asked for it. Get out and do some work, and you will get your money. If you earn it, you will get a raise." I think that is the way it was.

* * *

[214] Q Did you have occasion to speak to Mr. Peick later that afternoon?

A Yes, after the luncheon.

Q Would you tell us who was present and where it took place?

A It took place in Mr. Peick's office.

Q About what time?

A It had to be 1:00 or 2:00.

[215] Q That same day?

A Same day.

Q Who was present?

A I was present, John Navigato, Pete Janopoulos, Louie Peick, I think Don Heim was there.

Q As best you can recall, would you tell us what was said and by whom?

A Said by Mr. Peick, again when he reviewed the records of the two men, what had happened at the steward's meeting, the fact that they were passing out letters as a luncheon —

MR. POURITCH: Objection, this is hearsay again.

JUDGE WINKLER: It is not hearsay.

THE WITNESS: I was there.

JUDGE WINKLER: Objection overruled.

THE WITNESS: I am telling you what I heard in my presence. That we reviewed the records of the men again, which we did many times before the Executive Board, and that the fact that they created a disturbance at the steward's meeting, which was out of place, and the fact that they were passing out letters at a luncheon just to embarrass the union and the Executive Board and their work records were such that the Executive Board made a motion to discharge them, and they were discharged that day.

Testimony of John Navigato

[228] JUDGE WINKLER: And he also testified that among the basis for their recommendation was the fact of the poor work records, the fact that they had caused embarrassment to the Union by distributing this leaflet at the mayor's luncheon, and the fact also that Jackson had created disturbance at the stewards meeting, all those reasons were the reasons for the recommendation that they be fired, is that correct?

THE WITNESS: Right, sir.

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1298

GEORGE GILMER AND JAMES JACKSON,
Petitioners,

vs.

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION, LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that there was not substantial evidence that the NLRB balanced the rights of employees to engage in concerted activities against the legitimate business needs of the employer, that the NLRB failed to consider all of the relevant facts, and that the employees were not discharged for engaging in concerted activities but for continual flouting of the employer's rules, for engaging in personal business during work time and for insubordination?

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COUNTERSTATEMENT OF THE FACTS

In their factual background petitioners ignore crucial facts considered by the Seventh Circuit. As emphasized by the Court "this case does not involve an employer engaged in anti-union activity, nor does it involve employee dismissal for attempted union organizing" (A-5). Initially ignored is the fact that Jackson and Gilmer had both been "remiss in their duties," that the executive board of the union had recommended that they be fired, but the employer's chief executive instead issued them a written warning that if their performance did not improve, they would be discharged (A-3,15).

Shortly after this warning, they ignored the known established procedure of bringing wage increases to the attention of the secretary-treasurer or the board and interrupted a stewards' meeting by bringing up their requests for wage increases, (A-6,12).[1]

After the meeting, petitioners again disregarded the employer's known rules by using the employer's car radios to discuss their attempts to obtain wage increases (A-6,12).

Petitioners were warned the next morning about these violations and were told if their performance improved they would be given wage increases (A-6).

Six days later, they attended a political rally of several thousand persons honoring Mayor Bilandic on working time and in disregard of established procedures passed out wage complaints to some members of the board (A-6;14). Prior to the luncheon they distributed copies at the employer's office to other board members (A-14) and offered no explanation why it was necessary to pass out the letters at the luncheon instead of passing them out at the office or mailing them (A-6).[2]

Following the luncheon, the executive board reviewed all of the events, the poor performance, the interruption of the stewards' meeting, the improper use of the car radios, the Mayor Bilandic luncheon incident and discharged them.

The Administrative Law Judge (hereinafter ALJ), while finding that the car radios were improperly used, concluded that while "Gilmer and Jackson may not have been the most satisfactory of employees . . . [they] would not have been fired but for these two incidents" (A-15). The ALJ did not consider the improper use of car radios as a reason for their discharge, nor did he consider the employer's business needs or justification in having its rules obeyed.

The Seventh Circuit in refusing to enforce the Board's order considered all of the facts, including the use of car radios, questioned whether the ALJ and the NLRB had engaged in any

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1. The "only purpose of these stewards meetings is to discuss the ongoing administration of the contract shops" (A-12).

2. Petitioners again fail to inform this Court that they were on working time, acting as representatives of the employer when they attended the luncheon.

balancing process and held: "we do not find substantial evidence that they engaged in the required balancing process. That wage demands were made does not conflict with a dismissal for poor performance, for personal business during working time, and for insubordination. The balancing process requires more than a talismanic approach based on the mere articulation of a wage demand" (A-5).

REASONS FOR DENYING THE WRIT

The Court in weighing all the facts balanced the competing interests which the Board failed to do in concluding that the right to engage in concerted activities must be balanced against the legitimate business interest of the employer and that employees who continually choose to flout the rules after being warned are subject to discharge. The decision is in harmony with decisions of other circuits, and raises no policy questions.

Not infrequently a reviewing court refuses to enforce a Board order because of the absence of substantial evidence due to the failure of the Board to consider all of the facts in the whole record.[3] All of the facts relevant to the court decision had been credited by the ALJ but the ALJ who while finding that petitioners in disregard of their employer's known order used car radios to discuss their wage demands ignored such violation in determining whether the discharges were violative (A-12).[4] He improperly concluded that they had been discharged only because of an incident involving the stewards' meeting and the Mayor Bilandic luncheon. "I am satisfied that Respondent would not have fired them except for these two incidents" (A-15).

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3. In *NLRB v Enterprise Association of Steam, Hot Water, Hydraulic Sprinklers, Pneumatic Tube, Ice Machine and General Pipefitters of New York, Local No. 638*, 429 US 507, the Court observed "nor is it the case that the Board in applying its control standards failed to consider all of the relevant circumstances . . . or ignored any material circumstances" *id.* at 524. Enforcement denied: *NLRB v Whitfield Pickle Co.*, 374 F2d 576 (5th Cir 1967)—testimony arbitrarily disregarded; *American Mfg. Associates v NLRB*, 594 F2d 30 (4th Cir 1979)—no attempt of Board to justify a disregard of uncontroverted evidence; *Liberty Mutual Insurance Company v NLRB*, 592 F2d 595 (1st Cir 1979)—Board ignored testimony and disregarded employer's business justification for discharge; and *NLRB v Knuth Brothers*, 537 F2d 950 (7th Cir 1976)—Board ignored the impact of the company official's anger and the disastrous effect of the employees' conduct on the employer's operation.

4. An officer of the employer overhearing petitioners discussing their wage demand over the radio interrupted them by saying, "why don't you cut this out. This is no place to talk about anything like that on the air wave. There are other truck lines . . . other companies on the same air waves at this time of night. Cut it out . . . if you have any problems go see the old man" (NLRB Tr.p.187).

The improper use of the radio was crucial to the court's rationale, for this conduct constituted a link in a series of acts which violated the employer's known rules. Unlike the ALJ who ignored the radio incidents and considered the other incidents as being unrelated, and the Board which *pro-forma* adopted the ALJ's decision, the Court correctly viewed all of the events as being part of a panaroma in concluding that:

> The Union "went along," but with a warning, after the earlier discussion of poor performance. It "went along," but with a reminder of impropriety, after the stewards meeting. It went along after the CB radio warning. The luncheon event was the final straw. An employer should not be penalized for good-heartedness with employees who choose to flout its rules and ignore its warnings (A-7).

The Court after weighing all of the relevant facts followed the teaching of this Court by recognizing that "the ultimate problem is the balancing of the conflicting legitimate interest . . ." *NLRB v Truck Drivers Local Union No. 449, Int. Brotherhood of Teamsters,* 353 US 87.

The Court while recognizing the right of employees to engage in concerted activities to present wage demands observed: "nor can it be said that a mere characterization as related to wage demands requires a total disregard of the time, place, and manner in which the demands were made, or of the job performances of the dismissals," (A-5).

Petitioners, as the court noted, were not discharged after the stewards' meeting on April 5, or after the improper use of the car radios but were given another chance to comply with known rules and procedures and it was only after they again violated such rules at the Bilandic luncheon that they were discharged.

The argument that they attempted to follow the employer's procedures, however vaguely defined is not supported by the evidence.

The procedures which were disregarded by petitioners were found by the ALJ to be clear: (1) "the only purpose of the stewards meeting is to discuss the ongoing administration of the contract shops" (A-12); (2) Gilmer and Jackson were remiss in us[ing] the two-way telephones in the Union's cars for personal conversation (A-12); and (3) that they were directed to attend the

Mayor Bilandic Luncheon in their official capacity as representatives of the employer (A-14). The evidence disclosed that Jackson and Gilmer who were long term employees were aware that the established procedure was to ask the chief executive officer for a wage increase and in the past they had followed this procedure. Don Heim, a member of the executive board, told them "go into the front office just like I do. Get a private audience with Mr. Peick, speak your peace [sic] there" (A-28).

All that the court concluded was that employees who had been warned for poor performance and threatened with discharge, who had improperly interrupted a stewards meeting to bring up personal wage demands, who had improperly used the employer's car radios to discuss their wage demands, who had been warned about such conduct and who while on working time in their official capacity attended a political luncheon and improperly distributed wage letters are subject to discharge as a result of the totality of their conduct.

Petitioners were not acting at their peril, but were discharged on the third occasion when they deliberately violated known rules and used working time for their own purposes.

The Court correctly observed that after the third violation, the employer was justified in discharging them and that "the wage demand element in those actions [did not] influence the dismissals so as to achieve 'but for' status [and that] the NLRB failed to consider the legitimate business interest of the [employer] or to balance the employees right to petition against the employer's right to performance of assigned duties in a loyal manner," (A-5;7).

The Board instead of engaging in a true balancing evaluation held that the employees would not have been discharged except "but for" their activity. The failure to even refer to, let alone consider, the employer's business needs not to have its meeting interrupted by employees making wage requests, not to have its car radios used for such purposes, as well as not to have letters distributed at a political luncheon, is proof that the Board failed to accomplish the delicate task of "weighing the interest of employees in concerted activities against the interest of the employer in operating his business in a particular manner and of

balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *NLRB v Erie Resistor Corp.*, 373 US 221, 229. The Court concluded that "whatever balancing process may or may not have been here performed by the ALJ and the NLRB, articulated or *sub silentio*, we do not find substantial evidence that either engaged in the required balancing process" (A-5).[5]

The instant case represents no significant policy change and is only of future academic interest since the Board in the recent decision in *Wright Line, Inc.*, 251 NLRB No. 150, 105 LRRM 1169 (1980), has rejected the simplistic "but for" test in apparent agreement with the Court's conclusion that "the balancing process requires more than a talismanic approach based on the mere articulation of a wage demand" (A-5).[6]

Petitioner's reliance on *NLRB v Washington Aluminum*, 370 US 9, is misplaced. Those employees walked out because of bitterly cold conditions. This Court refused to "accept the Company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable 'cause' for discharging these employees" (*Id.* at 16).

Absent a contract restriction, employees obviously are free to engage in a strike at will and any rule which limits such a right is violative.

Here there was no walkout. All that was involved were employees who insisted that they had a right to interrupt an

---

5. It can be argued that the ALJ and the Board decision were departures from the Board's traditional practice since in a subsequent decision, the Board in an extensive review of the test required in 8(a)(3) cases commented: "the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so the inquiry then focuses on whether any 'legitimate business reason' asserted by the employer is successfully proven to be the cause of the discharge to negate the General Counsel's showing of prohibited motivation. *Wright Line, A Division of Wright Lines, Inc.*, 251 NLRB No. 150, 105 LRRM 1169.

6. In *Wright Line, supra*, the Board adopted the causality test enunciated in *Mt. Healthy City School District Board of Education v Doyle*, 429 US 274, since the "Mt. Healthy procedure accommodates the legitimate competing interests [of the parties] . . ." 105 LRRM at 1174.

employer's meeting to raise the subject of wage increases, to improperly use company radios to discuss wage increases and after having been warned again, breached a known rule by distributing letters while on working time at a citywide political meeting. *Washington Aluminum* does not stand for the proposition that an employee is not subject to discharge if he continues to violate rules which limit working time for work. Unlike *Washington Aluminum*, the employer had a known procedure under which employees desiring wage increases had an opportunity to present such demands to the chief executive officer or to the union's executive board. Complying with such procedures did not interfere with concerted activities, but only permitted the employer to operate its business in accordance with reasonable rules.[7]

---

7. When an employer has unilaterally established a mechanism for advancing employees' Section 7 rights, as opposed to establishing one pursuant to collective bargaining, the accomodation of the competing interests must shift in favor of the employer. *Advance Industries v NLRB.*, 540 F2d 878, 885 (7th Cir 1976). Employees cannot insist that their demands be met in the middle of a workday when the employer has promised to deal with them at day's end. *NLRB v Condenser Corp.*, 128 F2d 67 (3rd Cir 1942).

CONCLUSION

For all of the foregoing reasons, Respondent, Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America prays that the petition be denied as raising no issue warranting the Court's review.

Respectfully submitted,

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No. 80-1298

In the Supreme Court of the United States

OCTOBER TERM, 1980

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. Petitioners Gilmer and Jackson were employed by Respondent Union as business representatives. On April 4, 1977, during a monthly meeting of the Union's area stewards, officers and business representatives held to discuss the ongoing administration of the contract shops, Jackson and Gilmer complained about the low pay received by the Union's own staff employees. Louis Peick, the Union's executive officer, replied that this was neither the time nor place to discuss staff wages and instructed the two men to appear in his office the next morning (Pet. App. A-12 to A-13). Petitioners reported to Peick's office as instructed and were told they would get a raise when they earned it (Pet. App. A-3).

On April 11, prior to reporting for work, Jackson and Gilmer drafted, signed and made copies of a letter to Peick and the Union's executive board reiterating their wage complaints and expressing their desire to meet with the full executive board to discuss the matter as soon as possible. When they arrived at work, petitioners were told to attend that same day a community political luncheon honoring the Mayor of Chicago. During the luncheon, petitioners personally handed a copy of their letter to three or four of the Union's executive board members who were seated at various tables (Pet. App. A-13 to A-14).

Following the luncheon, the executive board convened and recommended that Peick discharge both men. One executive board member testified at the hearing before the Board's Administrative Law Judge that this recommendation was based upon petitioners' job performance, the "disturbance" created by their wage complaints at the April 4 meeting, and the "embarrassment" they caused the Union by handing out copies of their April 11 letter to the executive board members at the community luncheon. Peick called petitioners into his office that same afternoon and advised them they were being discharged for insubordination (Pet. App. A-14).

The Administrative Law Judge, whose decision was upheld by the Board, found that the "precipitating reason" for the discharges was petitioners' distribution of the letter at the Mayor's luncheon, and that "both this incident and * * * Jackson's salary complaints at the stewards meeting contributed substantially to Peick's decision to fire Jackson and Gilmer" (Pet. App. A-15). The ALJ found that "but for" these activities, the Union would not have fired petitioners (*ibid.*). Rejecting the Union's contention that petitioners' activities were unprotected because petitioners chose "inappropriate" occasions to air their complaints, the ALJ found "no reasonable basis in the circumstances for

withholding the normal protections accorded such activity" (Pet. App. A-16).

2. The court of appeals denied enforcement of the Board's order, concluding that the "dismissals were justified and not in retaliation for protected activity" (Pet. App. A-7). In reaching that conclusion, the court stated (Pet. App. A-6; footnote omitted):

> That employees are protected while presenting wage complaints does not give them carte blanche in choosing the method of presentation, or in their choice of time and place for making those complaints. Gilmer and Jackson had been employed by the Union for 14 and 8 years, respectively. They were fully informed of the established procedure to follow in seeking wage increases. They had attended earlier stewards meetings and knew the purpose of those meetings. Yet they elected to disregard established procedures and to present wage complaints at a meeting attended by stewards who are not employed by the Union, to the potential embarrassment of the Union and its leader who was conducting the meeting. Nonetheless, the Union leader met with them the next morning and told them they would be given a raise when their work indicated they deserved it. Six days later they again disregarded established procedures and passed out wage complaint letters to the board members at the Pilandic luncheon, again to the potential embarrassment of the Union.

The court found that Jackson and Gilmer were discharged for failing to follow "established, proper, and known procedures" in presenting their wage complaints and because they had "poor prior work records" (*ibid.*), and concluded that "[w]hen the entire panorama of events, not

just the goals expressed, is viewed, it is clear that those events constituted adequate and justifiable grounds for the present dismissals" (*ibid.*).

3. The petition presents the question whether employees may be deprived of the protection of Section 7 of the National Labor Relations Act, 29 U.S. 157, because their wage complaints arguably were lodged in an inappropriate fashion. The Board agrees with petitioners that the court of appeals erred in concluding that the manner in which they presented their complaints was so egregious as to remove their conduct from Section 7's protection. The Board did not, however, file its own petition because in its view the question presented turns on the particular facts of this case. Accordingly, the judgment below is not one which this Court ordinarily would review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Should the petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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